PP

v.

ONG CHENG HEONG

HIGH COURT MALAYA, KANGAR
VINCENT NG J
[CRIMINAL TRIAL NO: 45-01-98]
17 SEPTEMBER 1998
[1998] CLJ JT(11)

CRIMINAL LAW: *Dangerous Drugs Act 1952, s. 39B(1)(a) - Trafficking in cannabis - End of prosecution - Whether prima facie case made out - Meaning of prima facie - Dangerous Drugs Act 1952, ss. 37(d), 37(da), 37(h), 39B(1)(a) - Criminal Procedure Code, ss. 180, 182A*

CRIMINAL LAW: *Dangerous Drugs Act 1952, s. 39B(1)(a) - Possession of cannabis - Meaning of possession - Whether must prove exclusivity of custody and control - Dangerous drugs recovered from boot of motorcar - Accused in control and management of vehicle - Whether ipso facto putting accused in custody and control of all items therein*

CRIMINAL PROCEDURE: *Prosecution - Close of prosecution - Prima facie case - Degree of proof required to establish prima facie case - Whether proof beyond reasonable doubt - 'Prima facie' - Whether of one and same import as 'beyond reasonable doubt' - Evaluation of evidence - Whether 'maximum evaluation' coterminous with 'beyond reasonable doubt' - Criminal Procedure Code, ss. 180, 182A*

CRIMINAL PROCEDURE: *Prosecution - Close of prosecution - Trafficking in cannabis - Proof - Prima facie standard of proof - Precise nature and quantity of drugs - Whether required proof beyond reasonable doubt - Dangerous Drugs Act 1952, s. 39(B)(1)(a)*

EVIDENCE: *Expert evidence - Evidence of chemist - Dangerous drugs - Trafficking in cannabis - Testimony by chemist that cannabis is also Indian Hemp - Whether charge unsustainable - Test carried out on 179.40 grams of samples - Whether fatal to charge of trafficking - Whether necessary to test at least 200 grams of plant material - Dangerous Drugs Act 1952, ss. 2, 39B(1)(a)*

EVIDENCE: *Presumption - Section 114(g) Evidence Act 1950 - Tendering of bank withdrawal slips - Failure to call bank officer - Whether adverse presumption to be drawn against prosecution - General provision in s. 114 - Whether applicable to items not in search list*

The accused was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 2,870g of cannabis at a police road block at Simpang Empat, Perlis. The offensive drugs were recovered from the boot of a car ('P12') owned and driven by the accused. The chemist testified that the samples of the plant material that he tested, which grossed 179.40g were cannabis as defined under s. 2 of the Act, but added that cannabis was synonymous with Indian Hemp. The chemist evidence apart, PW6, the front passenger of P12 at the material time, affirmed however that: (i) he never saw the accused putting anything into P12's boot; (ii) he and the accused had slept at one Ah Aun's house at No. 13, Jalan Indah, Taman Indera Indah, Kuala Perlis the night before the arrest, and on that night, the keys to P12 were left on a table in the hall of the house; (iii) Ah Aun had driven P12 on the day of the alleged offence and had access to its keys then; and (iv) both he and Ah Aun had access to the boot of P12 during the material period before they were stopped at the police road block. PW6 was separately charged in the Magistrate's Court for having on his person a small quantity of heroin during the said car ride, and he had pleaded guilty to that charge.

Before the learned judge, the prosecution did not challenge PW6's testimony aforesaid. It was also evident that, notwithstanding that PW6 had asserted that Ah Aun was not a fictitious figure, no step was taken by the police to locate Ah Aun or the owner or occupier of house No. 13, Jalan Indah. The prosecution, nonetheless, sought to criminally link the accused to the drug exhibits by adducing evidence that the Thai market value of the offensive drugs amounted to about RM2,500, and that the accused, prior to his arrest, had withdrawn RM2,500 from an automatic teller machine for the purpose of purchasing the drugs in Thailand.

The defence argued that no *prima facie* case of trafficking or possession of the offensive drugs had been made out against the accused, and the court, therefore, ought to acquit and discharge the accused without calling for his defence. And, as the Court of Appeal in *Lt Kol Yusof Abdul Rahman v. Kol Anuar Md Amin* had ruled that the degree of proof required to establish a *prima facie* case was proof beyond reasonable doubt, an acquittal was all the more justified, upon the facts of the case. The preliminary issues that arose were: (i) whether the prosecution, at the end of its case here, had made out a *prima facie* case of trafficking or possession of the drug exhibits against the accused; (ii) whether '*prima facie*' and 'beyond reasonable doubt' could be of one and the same import, and in any case whether 'maximum evaluation' could be said to be coterminous or synonymous with 'beyond reasonable doubt'; (iii) whether, notwithstanding the *prima facie* standard of proof required to be established at the end of the prosecution case, some ingredients of the charge, such as the precise nature and quantity of the drug exhibits, need to be proved beyond reasonable doubt.

Held:

[1] The terms *'prima facie'* and 'beyond reasonable doubt' have been accorded statutory recognition by Act A979, particularly by ss. 180 and 182A thereof. By these sections, Parliament has made clear that the two expressions ought to be distinguished from each other. It follows that, to equiparate *'prima facie'* with 'beyond reasonable doubt' as being equipollent in degree or standard of proof, especially now, is to fly in the face of the clear will of Parliament as expressed in the Amendment Act.

[2] The rationale in *Lt Kol Yusof* drew its inspiration largely from the dicta of Buhagiar J in *Saminathan & Ors v. Public Prosecutor* as much as it was guided by the definition of *'prima facie'* in *Black's Law Dictionary* and *Mozley and Whiteley's Law Dictionary*. But Buhagiar J in *Saminathan & Ors* had only dealt with the phrases 'reasonable doubt' and 'beyond reasonable doubt', and not with *'prima facie'*. The assertion by the two law dictionaries *inter alia* that "a *prima facie* case can be overthrown only by rebutting evidence" can no longer hold water in view of the deliberate deletion of the words "which if unrebutted would warrant his conviction" from the old s. 180 of the Criminal Procedure Code ('the Code'). Consequently, the Court of Appeal in *Lt Kol Yusof* could not be right when it ruled that the degree of proof required to establish a *prima facie* case is proof beyond reasonable doubt. Be that as it may, *Lt Kol Yusof's* ruling in this respect may not be followed as the decision predated the amendments in Act A979 and its dicta on what constitutes *'prima facie'* was only obiter.

[3] In the light of the amendments in Act A979, a *prima facie* case is a case which is sufficient to call for an answer, whilst *prima facie* evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary but is not conclusive. It follows that there should be credible evidence on each and every essential ingredient of the offence.

[3a] It is true that courts will have to carry out a maximum evaluation of the evidence when determining whether a *prima facie* case has been made out under s. 180 of the Code. The terms 'maximum evaluation' and 'beyond reasonable doubt', however, are not coterminous or synonymous. Maximum evaluation simply means evaluation, on a *prima facie* basis, of each and every essential ingredient of the charge as tested in cross-examination. It connotes a quantitative rather than qualitative evaluation, and focuses on the evidential burden in terms of evidence led rather than on pursuasive burden in terms of qualitative degree of proof.

[4] In this case, notwithstanding the words of the chemist that the exhibits were also Indian Hemp, the accused's argument in this respect must fail. Section 2 of the Act clearly provides that "cannabis means any part of any plant of the genus cannabis from which there is found to be present resin irrespective of its quantity, and by whatever name the plant may be designated."

[5] Certain ingredients of the charge, such as the identity and precise nature of the drug exhibits, were not the kind of ingredients that the defence could, when called, be in a position to refute or disprove, in order to raise a reasonable doubt. That being so, at the *'prima facie'* stage of the trial, such ingredients must be proved beyond reasonable doubt. The position would remain so, notwithstanding that the words "which if unrebutted would warrant his conviction" had been removed from s. 180 of the Code by Act A979.

[5a] It follows that in this case, since only 179.40g of the plant material were tested and confirmed conclusively – beyond reasonable doubt – to be cannabis, the accused could only be called upon to enter on his defence, if at all, upon an amended charge of possession and not trafficking, even if a sufficient *prima facie* case had been made out on the other ingredients of the charge.

[6] Section 90A(2) of the Evidence Act 1950 implies that a document which derives its existence solely through the production of a computer may only be tendered to the court by – or through a certificate signed by – the person who is responsible for the management of that computer. In this case, PW3, when tendering the computer print-out on the particulars and ownership of car No. WDV 3265, did not claim any responsibility "for the conduct of the activities for which the relevant computer was used." Further, his declared designation as Supervisor at the Registration Department, RIMV Perlis, did not necessarily put him in management of – or in the conduct of activities pertaining to – the operation of the computer which produced P9A and P9B. The computer print-outs P9A and P9B were therefore inadmissible.

[6a] The inadmissibility of P9A and P9B notwithstanding, the fact remains that the evidence of PW6 that the said car belonged to the accused had not been challenged. The court must assume that PW6 was reliable unless there were cogent reasons to hold otherwise. In the circumstances, P12 must be taken as being owned by the accused.

[7] As motorcar No. WDV 3265 in this case was not "anything whatsoever containing" the compelling presumption did not arise and s. 37(d) of the Act was inapplicable. This apart, s. 37(h) of the Act was also inapplicable, as the boot of the car was not a "specially constructed (compartment) for the purpose."

[8] Without the presumption under s. 37(d) of the Act, the vital question to determine was whether the prosecution had made out a *prima facie* case of possession of the drug exhibits. Possession here means having control of the drug exhibits, combined with evidential or criminal proof of actual knowledge thereof. Also, for possession to be established, the prosecution must prove beyond reasonable doubt exclusivity of custody and control of the drugs. In other words, it must be shown that it was the accused, and the accused alone, who had possession of the drugs.

[9] The prosecution had failed to make out a *prima facie* case of exclusive custody and/or control of the drug exhibits against the accused, indeed not even on a 'minimal evaluation' basis. In the first place, the devastation wrought on the question of exclusivity of possession by the unchallenged narrative of PW6 was starkly apparent. Secondly, the court could not be unmindful that ownership of vehicle P12, with his mere presence therein and possession of the keys thereto at the time of his arrest, without more, could not be made a ground to call the accused to enter on his defence. The control and management of a vehicle by a person does not *ipso facto* put him in custody, control or management over all items therein.

[10] The facts as adduced also showed that: (i) it could well be that the two plastic bags containing the offensive drugs had been placed in the boot of P12 by some other person other than the accused; (ii) the accused's hands or fingernail clippings were not examined for traces of cannabis or cannabinoids; (iii) the plastic wrappers (P5B and P6B) and the newspapers (P5C, P6C(1-3), P6G) were also not dusted for finger prints; and (iv) no step was taken to trace Ah Aun although he was not a fictitious character. The prosecution has also failed to establish, by way of strong circumstantial evidence, a *prima facie* case of criminal possessory linkage between the accused and the dangerous drugs, or his criminal knowledge *(mens rea)* thereof.

[11] The ratio in *Alcontara Ambross v. Public Prosecutor* [1996]1 CLJ 705 must be carried to its logical conclusion, and an adverse presumption under the general provision of s. 114 of the Evidence Act 1950 could be drawn, to the effect that the non-listed items in the search list were not found on the person of the accused, considering that a

contemporaneously prepared search list would essentially be complete and exhaustive on the items relevant and essential to the case against the accused. In any event, an adverse presumption must be drawn against the prosecution under s. 114(g) of the Evidence Act 1950 for not calling the bank officer when tendering the three bank withdrawal slips. These bank slips must be completely disregarded and it followed that the evidence from the investigating officer concerning the RM2,500 withdrawal was without any basis and no weight should be accorded to it.

[12] From the evidence taken cumulatively, it could not be concluded that the prosecution had made out a *prima facie* case against the accused on trafficking, or even on possession of the drug exhibits. Upon PW6's unimpeached testimony, the car and the boot was, at the material time, accessible to no less than three persons, namely the accused, Ah Aun and himself. PW6's evidence, considered in its entirety, had indeed left the accused clean and dry.

[Accused acquitted and discharged without his defence being called.]

Cases referred to:

Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 ***(refd)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 ***(refd)***
Chee Chiew Heong v. PP [1981] 1 CLJ 43 ***(refd)***
Choo Teck Soon v. PP [1954] 20 MLJ 63 ***(refd)***
Choo Yoke Choy v. PP [1992] 4 CLJ 1791 ***(foll)***
Chow Kok Keong v. PR [1998] 2 CLJ 469 ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 ***(refd)***
De Silva v. PP [1964] 30 MLJ 81 ***(refd)***
Haw Tua Tau v. PP [1981] 1 CLJ 123 ***(refd)***
Ho Seng Seng v. Rex [1951] MLJ 225 ***(cit)***
Khoo Hi Chiang v. PP [1994] 2 CLJ 151 ***(refd)***
Koon Chye Hin v. PP [1961] MLJ 105 ***(refd)***
Kumaraguru & Ors v. PP [1994] 2 CLJ 53 ***(refd)***
Lee Chee Meng v. PP [1992] 1 CLJ 345 ***(refd)***
Lee Cheng (f) v. Seow Pang Kwang [1960] 26 MLJ 1 ***(refd)***
Leow Nghee Lim v. Reg [1956] 22 MLJ 28 ***(refd)***
Lin Lian Chen v. PP [1992] 1 CLJ 2086 ***(cit)***
Lt Kol Yusof Abdul Rahman v. Kol Anuar Md Amin [1997] 2 CLJ 752 ***(refd)***
Mohd Said Samad v. PP [1998] 2 CLJ 161 ***(cit)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 ***(cit)***
Munusamy v. PP [1987] 1 CLJ 250 ***(refd)***
Muthusamy v. PP [1948] MLJ 57 ***(foll)***
Ong Ah Chuan v. PP [1981] 1 MLJ 289 ***(refd)***
PP v. Alcontra Ambross Anthony [1993] 1 CLJ 206 ***(refd)***

PP v. Aris Yunus [1989] 1 CLJ 239 ***(refd)***
PP v. Bacho Samsudin [1994] 1 CLJ 143 ***(refd)***
PP v. Balasingham [1959] 25 MLJ 193 ***(foll)***
PP v. Basri Salihin [1993] 1 CLJ 420 ***(refd)***
PP v. Chin Yoke [1940] MLJ 47 ***(refd)***
PP v. Ismail Atan [1992] 2 CLJ 1253 ***(refd)***
PP v. Kang Ho Soh [1991] 3 CLJ 2914 ***(refd)***
PP v. Kau Joo Huat [1988] 1 CLJ 477 ***(refd)***
PP v. Khoo Boo Hock & Anor [1992] 1 CLJ 971 ***(refd)***
PP v. Lai Ah Bee [1974] 2 MLJ 74 ***(refd)***
PP v. Lim Teong Seng & Ors [1946] MLJ 108 ***(refd)***
PP v. Lin Lian Chen [1991] 1 MLJ 316 ***(cit)***
PP v. Mansor Mohd Rashid & Anor [1997] 1 CLJ 233 ***(refd)***
PP v. Mohd Fairus Omar [1997] 3 CLJ Supp 260 ***(refd)***
PP v. Mohd Nasir Shaharuddin & Anor [1994] 2 MLJ 576 ***(refd)***
PP v. Peter Yeoh & Anor [1993] 1 CLJ 78 ***(refd)***
PP v. Saad Mat Takraw & Anor [1998] 3 CLJ 380 ***(cit)***
PP v. Saimin & Ors [1971] 2 MLJ ***(refd)***
PP v. Saw Kok Leong [1993] 4 CLJ 83 ***(refd)***
PP v. Tang Chew Weng [1969] 2 MLJ 17 ***(refd)***
PP v. Tom It Cheong [1991] 1 CLJ 160 ***(refd)***
PP v. Yap Boon Chang [1992] 2 CLJ 1257 ***(cit)***
PP v. Yap Hai Ling [1990] 1 CLJ 983 ***(refd)***
PP v. Zulkifli Omar [1998] 1 CLJ 1079 ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39 ***(refd)***
Pavone v. PP [1984] 1 MLJ 77 ***(refd)***
Phoon Liat Sum v. PP [1950] 16 MLJ 205 ***(foll)***
R v. Abbott [1955] 2 All ER 899 ***(refd)***
R v. Harper [1989] 2 All ER 208 ***(refd)***
Saminathan & Ors v. PP [1955] 21 MLJ 121 ***(refd)***
Soo Seng Huat v. PP [1968] 1 MLJ 80 ***(refd)***
Syed Ali Syed Abd Hamid & Anor v. PP [1982] 1 MLJ 132 ***(cit)***
Tai Chai Keh v. PP [1948-49] MLJ Supp 105 ***(refd)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 ***(refd)***
Teh Geok Hock v. PP [1989] 2 CLJ 977 ***(refd)***
Yee Ya Mang v. PP [1972] 1 MLJ 120 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 2, 180, 182A
Dangerous Drugs Act 1952, ss. 2, 37(d), (da), (h), 39B(1)(a)
Evidence Act 1950, ss. 90A(1), (2), (3), 114
Evidence Order 1950, s. 3
Penal Code, s. 34

Other sources referred to:
Black's Law Dictionary, 4th edn
Law Dictionary, Mozley & Whiteley's, 1993, 11th edn, p 208
Oxford Companion of Law, p 987

For the accused - Jagdeep Singh Deo; M/s Karpal Singh & Co
For the prosecution - Abdul Razak Musa (Ms Quah with him)

Reported by WA Sharif

JUDGMENT

Vincent Ng J:

Before this court the abovenamed accused was charged, to wit:

> Bahawa kamu pada 16/9/97 jam lebih kurang 1.50 petang di Sekatan Jalanraya di hadapan Balai Polis Simpang Empat, di dalam Daerah Kangar, di dalam Negeri Perlis didapati dibawah kawalan kamu mengedar dadah iaitu ganja seberat 2,870 gram yang mana menyalahi peraturan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya, 1952 (Pindaan 1983). Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 39B(2) akta yang sama.

The facts of prosecution's case was elicited principally from Insp. Su That a/l Frat Kong (PW5) during examination in chief. He gave the following account of what happened.

On 16 September 1997 at about 12.15pm, acting on information, he led a police party comprising seven police personnel namely, Insp. Shaiful Azmi, D/SM 50934 Mohd. Nor, D/K 97660 Ku Ahmad Zamri, D/Kpl Wan Zin Wan Sulaiman (PW7), D/Kpl Baderi, D/Kpl Nicolas and Kpl. Musa to Balai Polis Simpang Empat, to conduct a road block in front of Simpang Empat, Perlis, Police Station. At about 1.50pm he stopped a Proton Wira car bearing registration No. WDV 3265 (P12) heading towards Alor Setar from the direction of Kangar. He then instructed that the car be driven into the Balai Polis Simpang Empat for inspection. There were two Chinese males in the car. The accused was at the wheel and one named Foo Fang Meng (PW6) was seated at the front passenger seat. On frisking the accused, he found nothing incriminating on this person. But when Foo Fang Meng was frisked by D/K Ku Ahmad Zamri, the latter recovered from his right front trousers pocket, a transparent plastic packet, within which were two straw tubes containing white powdery substance suspected to be heroin. The plastic packet was in turn placed in an empty (20 sticks) Dunhill cigarette box. As instructed by him the accused opened the boot of P12 by lifting the boot lever.

Upon inspection of the boot, PW5 found two plastic bags (P5A and P6A), a luggage bag of clothes and an open cardboard box, also containing clothes. P5A is a blue-black 'Cardini' plastic bag containing two packets of compact dried plant material suspected to be cannabis (P5F and P5J) wrapped in two pieces of Siamese character newspapers (P5C and P5G). And, P6A is a green

'Mun On Taylor' plastic bag, wherein he found another two packets (P6F and P6J) wrapped in Siamese and Chinese character newspapers respectively (P6C1-3 and P6G) containing compact dried plant material, also suspected to be cannabis. In both P5A and P6A but on top of P5F, P5J, P6F and P6J were men's clothes. When the drug exhibits were opened, the accused, who was beside him, appeared frightened. When the passenger compartment of P12 was checked by three members of the raiding party, they found nothing incriminating. Besides P5A and P6A and their contents, PW5 also seized certain personal belongings of the accused, including, one Motorola handphone (P13), one N.E.C. pager (P13A), and a wallet (P13B) containing: cash of RM103 (P13C); six credit and A.T.M cards (P13D1-P13D6); an identity card; a Public Bank Berhad cheque book (P13E); and a Maybank Savings Account book (P13F). A search list (P14) was issued on the items recovered. When P5F, P5J, P6F and P6J were weighed in the Simpang Empat, Police Station, they gave a rough total weight of 2,870 grams. He also recovered one ignition and two other keys (P15A to P15C) and handed them over to the investigating officer C/Insp. Mohd. Ismail bin Ibrahim (PW8).

The testimony of D/Kpl Wan Zin Wan Sulaiman (PW7) supported in material particulars the story of PW5, save that he added the following further particulars. P5A and P6A was taken out from the central portion of the boot of P12 when he made a search, under PW5' s instructions. Upon opening P5A he found a yellow shirt and a pair of green trousers (P5K and P5L respectively). P5F and P5J were together wrapped in a transparent plastic piece (P5B). P6A which was also recovered, contained a yellow 'T' shirt and a long sleeve "Batik" shirt (P6K and P6L respectively), under which he found the two other packets, P6F and P6J in a transparent plastic wrapper (P6B).

There were six other witnesses who testified namely: L/Kpl Rosdi bin Ismail (PW1 – the store keeper); L/Kpl Mohd Tajuddin bin Ariffin (PW2 – the photographer); En. Sobri bin Husin (PW3 – from JPJ); En. Shaharudin Hassan (PW4 – Government Chemist); En. Foo Fang Meng (PW6 – the front passenger in P12 who was subsequently charged and convicted for possession of a small quantity of heroin on his person at the time of travelling in P12); K/Insp. Mohd. Ismail bin Ibrahim (PW8 – the investigating officer). To avoid repetition, I would propose to discuss in detail, only in the course of my deliberation, portions of the evidence of some of the witnesses, that are material to the issues raised.

After eight (8) witnesses had testified in support of the prosecution's case, the learned deputy offered eight witnesses to the defence and closed his case. The accused's counsel Encik Jagdeep Singh Deo suggested that the offered witnesses to be called, be named as soon as and only should the defence be called. He then proceeded to make a lengthy submission of no-case-to-answer,

a substantial portion of which dealt with the nature of the *'prima facie'* standard of proof that the court ought to apply at the close of the prosecution case – post-amendment to s. 180 of the Criminal Procedure Code.

Though, based on the date (16 September 1997) of the alleged offence in the current charge, the prosecution and the defence were on common ground on the standard of proof to be applied at the close of the prosecution case, yet, because learned counsel for the accused, Encik Jagdeep Singh Deo had made a ponderous and vigorous submission on the proper construction to apply to the term *'prima facie'* it behoves this court to deal with this issue at length and with sufficient deliberation. The agreed applicable standard is the *prima facie* standard of proof imposed by the recent Criminal Procedure Code (Amendment) Act No. A979 of 1997 (Act A979). As Parliament has not spelt out the meaning of *'prima facie'* it is left to the courts to do so.

On the first day of his submission on the issue of what constitutes a *'prima facie'* case, counsel cited a Court of Appeal decision in *Lt Kol. Yusof bin Abdul Rahman v. Kol. Anuar bin Md. Amin* [1997] 1 MLJ 562 *(Lt. Kol. Yusof)* where it was held (see Held (3) at p. 563) that:

> The degree of proof required to establish a *prima facie* case is proof beyond all reasonable doubt.

And, this was precisely the words learned counsel adopted in his startling submission. He further submitted that pursuant to the ratio in the Federal Court decision in *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645 (pertaining to the operation of *stare decisis*), *Lt. Kol. Yusof* is an authority binding upon this court and must be followed, as the latest authority of superior jurisdiction on record. Apparently, it is an authority currently followed by a number of courts.

The above quoted headnote under Held (3) was quite correctly gleaned from the following dicta of the Court of Appeal in *Lt. Kol. Yusof* expressed in this way (at p. 578):

> **The degree of proof required to establish a *prima facie* case is** easiest demonstrated by asking ourselves what the court should do after the defence is called, if the accused elects to remain silent, calls no evidence, and cannot come up with any good reason why the earlier conclusion was wrong, eg, by bringing new authorities which take a different view of the law or pointing out some inherent weaknesses in the prosecution case he may have overlooked earlier. Thus unqualified, and unrebutted the court has to convict on the very same material. Nobody would dare suggest as a matter of prudence that the degree of proof required at this stage is not **proof beyond all reasonable doubt.** (Emphasis added)

It was a decision made prior to the Amendment Act A979, though the judgment also revealed that: "Encik Karpal Singh said that Parliament was in the process of restoring the effect of *Haw Tua Tau* by amending the Criminal Procedure Code (FMS Cap 6) ('the Code') and handed us copies of the Bill which he said was about to be gazetted."

For this reason, it was submitted that this court should attach authoritative weight or accord compelling pursuasive effect to the rationale in *Lt. Kol. Yusof,* though that decision was made before the Amendment Act A979 was gazetted.

So, it was ingeniously put forward to this court that the issue was not whether to apply the *'prima facie'* test or 'beyond reasonable doubt' test, but whether *'prima facie'* ought to be construed as 'beyond reasonable doubt'. Irrespective of the manner in which the issue was framed or couched by counsel, I cannot help noting that it was an attempt to hark back on the celebrated issue concerning the standard or degree of proof, which has now been finally and well settled by the amendment *vide* Act A979; it is unmistakably a revisit of the two cause celebre *Khoo Hi Chiang v. PP* [1994] 1 MLJ 265 *(Khoo Hi Chiang)* and *Arulpragasan a/l Sandaraju v. PP* [1997] 1 MLJ 1 *(Arulpragasan)* which overturned the ratio in *Haw Tua Tau v. PP* [1981] 2 MLJ 49 *(Haw Tua Tau).*

There was also this celebrated Federal Court decision in *Tan Boon Kean v. PP* [1995] 3 MLJ 514 *(Tan Boon Kean)* – notably, not mentioned in the *Lt. Kol. Yusof* judgment – which restored the effect of *Haw Tua Tau. Khoo Hi Chiang* and *Arulpragasan* (by a majority decision) held that the 'case' required to be made out by the prosecution under s. 180 is a 'beyond reasonable doubt case', whereas the *ratio decidendi* in *Hua Tua Tau* and *Tan Boon Kean* postulated the requirement of only a '*prima facie* case' at the close of the prosecution case. Undeniably, creditable, strenuous and erudite efforts have been made by both Edgar Joseph Jr (FCJ) and Mohamed Azmi (FCJ) in *Khoo Hi Chiang, Arulpragasan* and *Tan Boon Kean* to expound comprehensively – with no stone unturned, so to say – their contrary views in 'the great standard-of-proof devide'; which became an issue of tedious, tortured and tortuous debate in legal circles. And now, Parliament in its ascribed eternal wisdom has opted for the realistic and practical construction of what constitutes a 'case made out', by the amendment in Act A979, to restore the effect of *Haw Tua Tau* and use of the *'prima facie'* standard of proof at the close of case for the prosecution. This amendment, in my view, would also entail legislative reaffirmation of part of the dictum – as underscored hereunder – in *Pavone v. PP* [1984] 1 MLJ 77 (not discussed in *Khoo Hi Chiang*) where Edgar Joseph Jr J (as he then was) enjoined the courts to adopt the following – eminently sensible – approach:

> Now, the sole question at the close of the case for the prosecution is whether or not a *prima facie* case has been made out, that is to say, whether there is some evidence (not inherently incredible) which, if believed, establishes the essential elements of the offence charged. If there is such evidence, then the defence must be called but care must be taken to leave suspended the question of the veracity and accuracy of recollection of witnesses until after the close of the case for the defence. This applies even where, as here, the defence elects to remain silent and calls no evidence. Consequently, in a proper case, there is nothing illegal in a Magistrate or a President, or a Judge sitting alone or with Assessors, *calling for the defence upon prima facie evidence being adduced and then proceeding to acquit and discharge even when the accused elects to remain silent and to call no evidence if not satisfied that the charge has been established by the prosecution beyond all reasonable doubt.* (Emphasis added)

Hence, it would be unnecessary and otiose for me to add or say more in support of either side of the great devide – without seeming to rehash – besides what I have already said in *Kumaraguru & Ors v. PP* [1994] 1 MLJ 256 *(Kumaraguru)* where I had opined (at p. 263-H):

> The close of the prosecution's case and the close of the defence's case necessarily involve two very different stages of the trial and, upon the principles enunciated in *Haw Tua Tau* – approved and applied in the Federal Court decision of *A Ragunathan v. PP* ([1982] 1 MLJ 139) – also necessarily involve two different standards of proof, neither of which could be similar or dispensed with if the court has to suspend judgment at the close of the prosecution stage. It is highly essential that this dichotomy in the two entirely different stages, which in turn necessitates two distinctly different standards of proof should be consciously maintained by the court at both the stages. Logically, the rationale employed in deciding to call the accused to enter upon his defence, which is based on asking certain hypothetical questions, could not be the same rationale for the conviction of the accused, in our system of justice which permits one and only one standard of proof for conviction; and that is that each and every essential element of the offence has to be proved beyond reasonable doubt.

The point taken by counsel became an intellectual discourse between bench and bar upon an issue that had confounded the courts until the amendment by Act A979. Yet, the same issue – apparently dressed differently – now revived before me, threaten to further keep the courts befuddled and bemused *ad infinitum.* Could both *'prima facie'* and 'beyond reasonable doubt' rationally be one and the same in import? Now, in comes along *Lt. Kol. Yusof,* introduced by counsel, for curial inspection of its rationale.

So, on *Lt. Kol. Yusof*, I am minded to be frugal with words. The rationale for that decision drew its inspiration largely from the dicta of Buhagiar J in *Saminathan & Ors v. PP* [1955] 21 MLJ 121, which was extensively quoted; and was guided also by the definition of *'prima facie'* in *Black's Law Dictionary* (4th Ed) and in *Mozley and Whiteley's Law Dictionary* (11th Edn, 1993 – at p. 208), both of which state, (in virtually similar terms) that "A litigating party is said have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side."

After careful perusal of the quoted dissertation in *Saminathan and Ors*, I cannot help but note that Buhagiar J had only dealt with and discussed the construction of the phrases 'reasonable doubt' and 'beyond reasonable doubt' but not *'prima facie'*. Also to be noted in that judgment, is that, having correctly expressed his views that, it "is a rule of prudence rather than law that requires more stringent proof in criminal than in civil cases" (though, Amendment Act A979 has now elevated this 'rule of prudence' to a statutory provision), and that, the "background for the rule of prudence that requires more stringent proof in criminal than in civil cases is the presumption of innocence which came to maturity about 1865", it is, in my opinion, rather incongruous and inconsistent for Buhagiar J to go on to hold that the definition of 'proved' in s. 3 of the Evidence Ord 1950 "applies to civil and to criminal cases and to prosecution and defence" (ie with the same probative effect) – the year 1820 decision in *R v. Burdett*, cited therein, notwithstanding.

Under the definition provision in s. 3: "a fact is said to be 'proved' when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists." In this regard it is pertinent to bear in mind that though our system of criminal jurisprudence operates under the principle of presumption of innocence, such presumptions have no application, and are totally alien to civil law. Also to be borne in mind is that, for a conviction of an accused, the essential ingredients of the offence would not only have to be 'proved' but, essentially, 'proved beyond reasonable doubt' – this, it must surely be, by 'a rule of prudence' requiring a 'more stringent proof'. Thus, there is clearly a distinct dichotomy of the pursuasive burden or standard of proof applicable in criminal cases on the one hand and civil cases (save in cases of fraud and forgery) on the other; the same standard of proof cannot apply.

Concerning the very similar definition of *'prima facie'* in *Black's and Mozley and Whiteley's* dictionaries, it is highly pertinent now to examine the precise nature of the amendments in Act A979, and their implications. The old s. 180 of the Code stated:

> When the case for the prosecution is concluded the Court, if it finds that no case against the accused has been made out **which if unrebutted would warrant his conviction** shall record an order of acquittal, or, if it does not so find, shall call on the accused to enter on his defence. (Emphasis added)

The new s. 180 in Act A979 reads:

> (i) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has **made out a *prima facie* case** against the accused.
>
> (ii) If the Court finds that the prosecution has not **made out a *prima facie* case** against the accused, the Court shall record an order of acquittal.
>
> (iii) If the Court finds that **a *prima facie* case has been made out** against the accused on the offence charged the Court shall call upon the accused to enter on his defence. (Emphasis added)

Thus, the deliberate deletion of the words 'which if unrebutted would warrant his conviction' from the old s. 180 of the Code is significant. By this deletion, surely, the second limb of the definition of '*prima facie*' in the two law dictionaries – which goes on to suggest that such *prima facie* case can be overthrown only by rebutting evidence – could no longer be applicable now. And further, to make its intention crystal clear the Legislature added a new provision s. 182A which provides:

> (i) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has **proved its case beyond reasonable doubt.** (ii) If the Court finds that the prosecution has **proved its case beyond reasonable doubt,** the Court shall find the accused guilty and he may be convicted thereon. (iii) If the Court finds that the prosecution has not **proved its case beyond reasonable doubt,** the Court shall record an order of acquittal. (Emphasis added).

Notably, from the aforesaid fresh provisions, the two time honoured phrases '**made out** a *prima facie* case' and '**proved** its case beyond reasonable doubt' were thrice repeated in each of the two ss. 180 and 182A of the Code respectively, and pertaining to two different stages of the trial. Hence, at long last the expressions '*prima facie*' and 'beyond reasonable doubt' have gained statutory recognition – such legal cliches or 'rule of prudence' have now been elevated to a statutory provision. And, most importantly, the legislative intent of Parliament has also now been made manifest in no uncertain – nay, crystal clear – terms, to the effect that the two expressions ought to be distinguished one from the other. This construction could perhaps more appropriately be bolstered by an apt quotation from the judgment of Thomson CJ in *Lee Cheng (f) v. Seow Pang Kwang* [1960] 26 MLJ 1, who had this to say (at p. 3):

> It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here, used repeatedly.

This approach is consistent with the approach taken by the courts in several other Commonwealth countries. In Malaysia, particularly since the decision of the Privy Council in the case of *Haw Tua Tau*, this has also been the approach taken by the Supreme Court and the Federal Court (except in the case of *Khoo Hi Chiang* in 1993) prior to *Arulpragasan's* case.

In *PP v. Zulkifli b. Omar* ([1998] 1 CLJ 1079 and Judgment Today 4/98), I had expressed the view that "the duty of the court is to reflect the concern of Parliament and also, which is sometimes forgotten, to reflect the concern of the public about these matters". The corollary to that being: it is also incumbent on the courts to give expression and implement the manifest intention of the Legislature expressed in crystal clear terms (as on this issue) to the effect that there must necessarily be a distinction between the words *'prima facie'* on the one hand and 'beyond reasonable doubt' on the other, in criminal prosecutions. To equiparate *'prima facie'* with 'beyond reasonable doubt' as being equipollent in degree or standard of proof, especially now, would be to fly in the face of the clear will of Parliament as expressed in Amendment Act no. A979; and with its gazetting, the courts should not continue to apply the beyond-reasonable-doubt test under the guise of or couched as a *'prima facie'* standard.

Furthermore, after a reflective study of *Lt. Kol. Yusof* and mulling over dicta in that judgment, with the greatest respect, I found myself unable to agree with its rationale for deciding that the degree of proof required to establish a *prima facie* case is proof beyond all reasonable doubt. Additionally, besides the consideration that the decision in *Lt. Kol. Yusof* predates the amendments in Act A979, I also find that it is not an authoritative judicial precedent which is binding and must be followed under the principle of *stare decisis*, as the dicta therein on what constitutes *'prima facie'* was an *obiter dictum* rather than *ratio decidendi*. And, it is material to note that though the *'prima facie'* issue was raised, discussed and deliberated by the Court of Appeal in *Lt. Kol. Yusof* the views expressed therein in no way – not an iota – affected the outcome of the appeal, as was revealed by the following passage in that judgment (at p. 579): "We entirely agree with the view of the learned High Court judge that had the court martial applied the *Khoo Hi Chiang* test it would have still called for the defence", and further down (at p. 580): "We agree with the learned judge in the court below that the failure to resort to r. 101(2) was sufficient ground for the refusal to exercise any discretion for prerogative relief in the accused's favour."

For all the above reasons, I rejected counsel's initial submission that the degree of proof required to establish a *prima facie* case is proof beyond all reasonable doubt. Then, on the following day, counsel changed tack and advanced a point, which I must say, was as fresh as the seasonal wintry winds of Perlis. He submitted that to consider whether a *prima facie* case has been made out under s. 180 of the code, the court would have to carry out a maximum evaluation of the evidence. This, I am inclined to agree as I find a common unifying thread or common denominator that runs through the three celebrated cases, *Khoo Hi Chiang, Tan Boon Kean* and the majority and minority judgments in *Arulpragasan*, being that: the determination whether a *prima facie* case has been made out would essentially involve a maximum evaluation of the evidence led by the prosecution. Unfortunately, the expression 'maximum evaluation' was not specifically defined in any of the cases. This is how it was put by Azmi FCJ in *Tan Boon Kean* (at p. 534):

> we are, therefore, of the opinion that the court below is only bound by the ratio of *Khoo Hi Chiang* that at the close of the case for the prosecution, the duty of the court is **to carry out a maximum evaluation of the evidence** which, according to *PP v. Chin Yoke* [1940] MLJ 47 and followed in *Munusamy v. PP* [1987] 1 MLJ 492 at pp. 497-498, necessarily means that the court must consider the whole evidence of the prosecution as tested in the cross-examination, on the essential ingredients of the charge. (Emphasis added)

Whereas, the crucial view of the Supreme Court in *Khoo Hi Chiang* was summarised by Edgar Joseph Jr SCJ (at p. 290) as follows:

> Consequently, the duty of the court, at the close of the case for the prosecution, is **to undertake,** not a minimal evaluation of the evidence tendered by the prosecution in order to determine whether or not the prosecution evidence is inherently incredible – the *Haw Tua Tau* test – but **a maximum evaluation of such evidence,** to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt. (Emphasis added)

Thus, upon careful study of the judgments, I gather that, in essence, the only part where the opposing views in the 'great standard-of-proof devide' seriously differ is on the question whether to equiparate maximum evaluation with beyond all reasonable doubt – as if the two phrases are coterminous or synonymous. It cannot in my view be coterminous. Thus, to me, maximum evaluation simply means evaluation, on a *prima facie* basis, of each and every essential ingredient of the charge as tested in cross-examination. In other words, maximum evaluation connotes quantitative rather than qualitative evaluation of the evidence; with focus more on the evidential burden in terms of evidence led, rather than the pursuasive burden in terms of qualitative degree of proof.

What then constitutes a '*prima facie* case'? '*Prima facie*' means on the face of it or at first glance. To me, in the light of the Amendment Act A979, perhaps the most appropriate definition of 'a *prima facie* case' could be found in the *Oxford Companion of Law* (p. 987), which has it as: "A case which is sufficient to call for an answer. While *prima facie* evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, **but is not conclusive**". (Emphasis added). It would follow that there should be credible evidence on each and every essential ingredient of the offence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon, should be rejected.

Reverting to the current case it is necessary for this court to consider whether, from the evidence led on all the essential elements of the charge as tested in cross-examination, a *prima facie* case has been made out, being a case which, though not conclusive, is sufficient to call for an answer. Both the prosecution and the defence rested on the common ground that: (a) the case against the accused is wholly based on circumstantial evidence, because when PW5 frisked the accused, he found nothing incriminating on this person; (b) as a motor car (vehicle bearing registration no. WDV 3265 in the instant case) is not 'anything whatsoever containing' the compelling presumption does not arise and s. 37(d) is inapplicable (see *Syed Ali bin Syed Abd. Hamid & Anor v. PP* [1982] 1 MLJ 132 and *Lin Lian Chen v. PP* [1992] 2 MLJ 561); (c) s. 37(h) is also inapplicable, as the boot of the said car is not a 'specially constructed (compartment) for the purpose'; (d) hence, before considering whether s. 37(da) could be invoked, possession has to be proved by way of evidential or factual finding of possession, through having custody and control or management coupled with proof of actual knowledge or circumstances clearly pointing to knowledge of the dangerous drugs (see also *Muhammed bin Hassan v. PP* [1998] 2 MLJ 273, *Mohd. Said bin Samad v. PP* [1998] 2 MLJ 294, and *PP v. Saad Mat Takraw & Anor* ([1998] 3 CLJ 380 and Judgment Today 9/98).

Let us now, within the confines of the four above common denominators, examine the evidence led by the prosecution, through issues raised by counsel in his no-case-to-answer submission, whether, a *prima facie* case, such as I have defined above, has been made out.

Chemist Evidence

The issue taken on this score was two-fold, namely: if the drug exhibits could also be Indian Hemp the current charge is unsustainable; and the failure of the prosecution to conclusively show that at least 200 grams of the plant material was cannabis. PW4 in the course of his testimony had readily agreed

when cross-questioned that cannabis is synonymous with Indian Hemp and the drug exhibits P5F, P5J, P6F and P6J could also be Indian Hemp. Thus, counsel said, though he had taken the same issue earlier – about two months ago – in *Saad Mat Takraw,* and this court had therein observed that the point was 'a feeble challenge, uttered in virtual undertones with tongue in cheek', he has perforce to again bring up this issue in the current case, but not with 'tongue in cheek', as PW4 had clearly confirmed that P5F, P5J, P6F and P6J which he had analysed could also be called Indian Hemp. I am also impelled to observe that this Indian Hemp issue could be likened to a flotsam that keeps resurfacing in the wake of certain apparent historical freaks of legislation.

Notwithstanding the above candid words of PW4 on the exhibits being also Indian Hemp, I would nevertheless hold that the current attack by learned counsel is untenable and again fails. The ready answer to this is found in (the interpretation) s. 2 of the Act, which provides that: "Cannabis means any part of any plant of the genus cannabis from which there is found to be present resin irrespective of its quantity, and **by whatever name the plant may be designated.**" (Emphasis added). Most importantly, he did assert that samples of the plant material he tested were conclusively cannabis as defined under s. 2 of the Act. The essence distilled from his evidence could be stated thus: a plant material which contains the two principal active generic compound of cannabinoid namely, tetrahydrocannabinol and cannabinol is called cannabis in Malaysia, Indian Hemp in India and Marijuana in United States of America. It is precisely due to the presence of these two deleterious active chemical compounds in the plant material of the genus cannabis that criminalises the possession or trafficking thereof; also, precisely why the third and fourth tests would be crucial. Thus, if it is really a spade here, it does not matter one nought whether it is also called a shovel in the United States of America. For example, it is common knowledge that paracetamol (medication for pain and fever) is the chemical generic for panadol, coxa 500, milidon, setromol, setamol and uphamol.

Concerning the need for the chemist to test at least 200 grams or more of the plant material, through the taking of a total sample of 200 grams or more of same, in order for the court to call the defence on a charge of trafficking, reference is made to what I had earlier said in *Saad Mat Takraw (supra)* at p. 401 to 403 and I do not propose to say more. The only question, yet to be asked is: whether at the *'prima facie'* stage of the trial, this ingredient of the charge, namely, the precise nature and quantity of the drug exhibits would have to be proved beyond reasonable doubt.

In *PP v. Peter Yeoh & Anor* [1993] 1 CLJ 78, on the issue taken concerning the identity of the drug exhibits, I expressed the following views (at p. 82): "It is useful to note that the second ground raised by the defence counsel is not a rebuttable element of the ingredients of the charge as envisaged under s. 180 of the Criminal Procedure Code. As such, I would be indulging in a spurious exercise in semantics by calling for the defence due to the lesser burden placed on the prosecution at this stage, in order to apply the heavier beyond-reasonable-doubt-test burden and acquit both the accused persons should they decide to remain silent – nay a curious and circuitous manner of calling a spade a spade." Similarly, in *PP v. Saw Kok Leong* [1993] 4 CLJ 83, I opined (at p. 87): "However, where there are no markings or initials to give the offending items an identity of its own, the Court must examine with special care, in order to be satisfied beyond doubt (even at the stage of close of the prosecution case), that there is not even a single serious gap in the chain of handling the offending item." And, subsequently, in *Kumaraguru & Ors v. PP* [1994] 1 MLJ 254 (at p. 264) I again had occasion to state: "Even then, it is this court's view that the expression 'if unrebutted' would seem to confine the application of the lower *'prima facie'* test at the close of the prosecution's case, to only the rebuttable (essential) elements of the charge. Whereas, in respect of certain essential elements of the charge which are not of the rebuttable type, eg the identity of the offending exhibits, the prosecution would have to establish such irrebuttable elements upon a higher beyond reasonable doubt test in order for the defence to be called."

In my considered view, the removal of the phrase "which if unrebutted would warrant his conviction" by the Legislature in the Amendment Act A979, neither diminish nor detract from the validity or rationale of my views in the above three cases, as certain ingredients of the charge eg, the identity and precise nature of drug exhibits, are not the kind of ingredients that the defence could, when called, be in any position to refute or disprove, in order to raise a reasonable doubt: see also *PP v. Lim Teong Seng & Ors* [1946] MLJ 108; and, *Tan Boon Kean v. PP* [1995] 3 MLJ 514 (at 528 para H to I).

In the case now before me, PW4 conceded that the total or gross weight of the 32 random samples that he had taken from P5F, P5J, P6F and P6J was 179.40 grams out of the total 2,718 grams of the plant material. Consequently, as only 179.40 grams was tested and confirmed conclusively – beyond reasonable doubt – to be cannabis, I would hold that, even if a sufficient *prima facie* case has been made out on the other ingredients of the charge, the accused could be called upon to enter on his defence, only upon an amended charge of possession and not trafficking.

Motor Car No. WDV 3265 (Exhibit P12)

It was also submitted that the prosecution has failed to comply with the provisions of the Evidence Act 1950, in particular s. 90A(2) thereof, and certificates (P9A and P9B) tendered by PW3 ought to be inadmissible as evidence.

In this era of computers and information technology, even the Evidence Act would have to be brought abreast with the period. On this, the words of Steyn J in *R v. Minors* and *R v. Harper* [1989] 2 All ER 208 (at p; 210) is apropos. He said:

> The law of evidence must be adapted to the realities of contemporary business practice. Mainframe computers, minicomputers and microcomputers play a pervasive role in our society. Often the only record of a transaction, which nobody can be expected to remember, will be in the memory of a computer. The versatility, power and frequency of use of computers will increase. If computer output cannot relatively readily be used as evidence in criminal cases, much crime (and notably offences involving dishonesty) will in practice be immune from prosecution. On the other hand, computers are not infallible. They do occasionally malfunction. Software systems often have 'bugs'. Unauthorised alteration of information store on a computer is possible. The phenomenon of a 'virus' attacking computer systems is also well established. Realistically, therefore, computers must be regarded as imperfect devices.

And so, a new provision – Section 90A – was legislated into being. Section 90A(1) to (3) read as follows:

> (1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.
>
> (2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court **a certificate signed by a person who** either before or after the production of the document by the computer **is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.** (Emphasis added)
>
> (3) (a) It shall be sufficient, in a certificate given under subsection (2), for a matter to be stated to the best of the knowledge and belief of the person stating it.
>
> (b) A certificate given under subsection (2) shall be admissible in evidence as *prima facie* proof of all matters stated in it without proof of signature of the person who gave the certificate.

In my analysis, s. 90A(2) in essence, implies that a document which derives its existence solely through the production of a computer could only be tendered to the court by – or through a certificate signed by – the person who is responsible for the management of that computer. It stands to reason that, if such certificate is tendered, the opposing party is entitled to cross-examine its (the certificate) maker if so desired. The courts have to be mindful that the failure of a computer, or a software programme, may occasionally result in total failure to supply the required information, or in the supply of unintelligible or obviously wrong information.

When PW3 tendered the two computer print-out, P9A and P9B, he only introduced himself as the supervisor of the registration department of vehicles in the R.I.M.V. Perlis ('mengawal selia bahagian pendaftaran kenderaan') and he did not claim any responsibility 'for the conduct of the activities for which the relevant computer was used'. His declared designation does not necessarily put him in management of – or in the conduct of activities pertaining to – the operation of the computer which produced P9A and P9B; not to mention that even in his registration department there are a number of officers including himself who may be holding varied and myriad functions unconnected with a computer. I would therefore rule the computer print-out, P9A and P9B, inadmissible. But this is not the end of the matter. Though the tendering of the two said print-out comprise the major plank in the prosecution case, yet there is also unchallenged testimony from PW6 that the car P12 belonged to the accused. The court must assume that the witness is reliable unless there are cogent reasons to hold otherwise: See *De Silva v. PP* [1964] 30 MLJ 81; and *Koon Chye Hin v. Public Prosecutor* [1961] MLJ 105. The point taken by the defence therefore fails, and I find that the car P12 is owned by the accused.

Yet another flotsam from *Saad Mat Takraw* was refloated by the learned deputy when he submitted that, as the definition of 'trafficking' in s. 2 of the Act is very wide, this court could consider invoking that provision as an alternative to s. 37(da): See *Ong Ah Chuan v. PP* [1981] 1 MLJ 289; and *Teh Geok Hock v. PP* [1989] 3 MLJ 162. Again, for the same reasons I had set out in detail in *Saad Mat Takraw* (at p. 406 and 407), which I do not think it necessary to repeat, I would reject this contention: see *Chow Kok Keong v. PR* [1998] 2 AMR 1401.

I shall now turn to the very pith and kernel of the no-case-to-answer submission. Without the presumption under 37(d), the vital question for this court to determine (even before the question of trafficking) is: whether the prosecution has made out a *prima facie* case, of possession of the drug exhibits as understood in criminal law. And, possession here means having custody and control, combined with evidential or criminal proof of actual knowledge,

or circumstances clearly and irresistably pointing to knowledge, of the drug exhibits (see *Lin Lian Chen (supra)* – p. 567).

Possession – through having control and custody – in order to incriminate a person, must be such that the possessor must know the nature of the thing possessed: See *PP v. Kau Joo Huat* [1988] 2 MLJ 91; *Choo Teck Soon v. PP* [1954] 20 MLJ 63; and *PP v. Basri bin Salihin* [1994] 2 MLJ 476. Having exclusive custody and control implies and involves having knowledge both of the drugs and the nature thereof: See *Ho Seng Seng v. Rex* [1951] MLJ 225; *PP v. Kang Ho Soh* [1991] 3 CLJ 2914. And, for the purpose of criminal liability, without exclusive custody and control of the drugs, the mere fact that the accused had knowledge thereof is insufficient to incriminate: See *PP v. Basri bin Salihin (supra); PP v. Mohd Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576; *Choo Yoke Choy v. PP* [1992] 2 MLJ 632; *PP v. Lai Ah Bee* [1974] 2 MLJ 74; *Yee Ya Mang v. PP* [1972] 1 MLJ 120; *PP v. Khoo Boo Hock & Anor* [1992] 1 CLJ 971; *PP v. Kau Joo Huat (supra)*; and *PP v. Mohd Fairus bin Omar* [1998] 5 MLJ 729.

There is a welter of authoritative precedents binding upon this court, which held that for possession to be established, accessibility by others to the place where the drugs are found, should be excluded by evidence led by the prosecution: See *PP v. Kang Ho Soh (supra)* – where the accused had sole custody and control of the car for being its sole occupant, ala *PP v. Alcontra a/l Ambross Anthony* [1993] 1 CLJ 206; and, also *PP v. Tang Chew Weng* [1969] 2 MLJ 17 – where there was "absence of any evidence of any one nearby with access to the sleeping berth, a defence for the accused to put up and not to be anticipated, least of all by the trial president". The onus is "not on the defence to proof possibility of access by others but on the prosecution to exclude such possibility," and the "question must be answered in favour of the accused if there are more than one ways in which the evidence adduced by the prosecution might be viewed," such as "implicating the appellant or the wife or both of them or the informer or even Muhammad (the other man living in the house)" – Per Edgar Joseph Jr SCJ in *Abdullah Zawawi bin Yusoff v. PP* [1993] 3 MLJ 1 (see also *Tai Chai Keh v. PP* [1948-49] MLJ Supp. 105). In other words, exclusivity of custody and control of the drugs ought to be established by the prosecution. Thus, in *Choo Yoke Choy v. PP* [1992] 2 MLJ 632, the Supreme Court held that, "The prosecution therefore has to establish beyond reasonable doubt that the appellant alone had possession of the drugs or that both he and his wife had joint possession of the drugs": See *PP v. Basri bin Salihin (supra); PP v. Muhamad Nasir bin Shaharuddin & Anor (supra);* and also *Pang Chee Meng v. PP* [1992] 1 MLJ 137. The

prevailing law was further buttressed by Abdul Hamid Omar (LP) when he said (at p. 142), to wit: "In the light of the material contradictions and the circumstances surrounding, we are not satisfied that the prosecution had proved exclusive custody and control of the drugs found in the room."

Incidentally – also on the question of exclusivity – it has been decided in *Lee Chee Meng v. PP* [1992] 1 MLJ 322 that to be an 'occupier' of the room or premises within the meaning of s. 37, the accused must have exclusive occupation or exclusive use and care or management of the room or premises where the offending exhibit is found (see also *PP v. Aris bin Yunus* [1989] 1 CLJ 239; and, *R v. Abbott* [1955] 2 All ER 899 – where two people were jointly indicted and evidence did not point to one rather than the other, and there was no evidence that they were acting in concert). And, occupation is presumed on prove of care or management and control – but it has to be exclusive occupation: see *PP v. Yap Hai Ling* [1990] 1 CLJ 983. Indeed, perhaps upon the 'futility rationale' (discussed below), exclusivity of possession is an essential ingredient to be established by the prosecution before defence can be called, even on a *prima facie* standard of proof, not only on a charge of trafficking but also on one of possession. Hence, the following pre – *Khoo Hi Chiang (supra)* cases illustrate the consistent line of approach taken by the courts, where it has been held that without such exclusivity even a *prima facie* case cannot be said to have been made out: see *PP v. Yap Hai Ling* [1990] 1 CLJ 983; *PP v. Tom It Cheong* [1991] 1 CLJ 160; *PP v. Bacho bin Samsudin* [1994] 1 CLJ 143; *PP v. Ismail bin Atan* [1992] 2 CLJ 1253; *PP v. Aris bin Yunus (supra).*

Thus, it is trite law that evidence of custody, control and knowledge can be rebutted by evidence appearing in the prosecution case: See *Leow Nghee Lim v. Reg* [1956] 22 MLJ 28; *Soo Seng Huat v. PP* [1968] 1 MLJ 80; and *Chee Chiew Heong v. PP* [1981] 2 MLJ 287. And so, since PW6 was not merely offered to the defence, but called by the prosecution to testify, his testimony has now become an integral part of the recorded evidence, which the court would have to examine carefully, as it would play a major if not crucial role in its deliberation whether to call for the defence. PW6's testimony was unchallenged by either side, and could greatly assist the court to determine whether the accused had: (a) exclusive custody and control; and (b) knowledge of the nature of the drugs exhibits.

PW6 said that both he and the accused left Johore for Perlis on the night of 14 September 1997, reached Perlis on the morning of 15 September 1997, and went straight to the house of one named Ah Aun. The purpose of coming to Perlis was to see Ah Aun. The last occasion he drove P12 was when they were on the highway from Johore to Perlis. At Perlis they passed a night with

Ah Aun in Ah Aun's house. During their stay in Perlis, they did not go anywhere, not even to Langkawi. He was very sure of this as he had slept beside the accused in Ah Aun's house. On the following morning, on 16 September 1997 the accused woke him up after he (the accused) had taken a shower. Soon thereafter, at around 10am, he saw Ah Aun driving the accused's car (P12) back and carrying home some food he had bought for breakfast. After breakfast at Ah Aun's house they stayed there until about 12 noon, when they left Perlis for Johore. The last day he held the car key to P12 was on the night of 14 September 1997. The last time he saw the car boot of P12 opened was on the morning of 15 September 1997 when he opened it to take out a shirt for a change of clothes. The keys to P12 (P15A-C) were not kept by the accused when they are at Ah Aun's house as he had placed them on a table in the living room. And, he does not know to whom the two plastic bags, P5A and P6A, belong or when they were placed in the boot. He did not see the accused put anything into the car boot.

On 16 September 1997, at about 1.50pm, when he was arrested, he was travelling in car P12 as a front passenger, with the accused at the wheel. He admitted that upon his arrest and being frisked by the police, they recovered from his right, front trousers pocket, a plastic packet and two straw tubes of heroin contained in a Dunhill cigarette packet (20 sticks size). As the result of which, he was charged in the Kangar Magistrate's Court, for possession of heroin. He pleaded guilty to the charge, and was sentenced to two weeks imprisonment and a fine of RM2,000 – in default six months imprisonment. He further asserted that he had never seen either of the two plastic bags (P5A and P6A) or their contents, at any time before he was arrested.

Hence, the devastation wrought on the question of exclusivity of possession, by the narrative of PW6, was even then starkly apparent, as he had given affirmative evidence to the effect that: (a) Ah Aun was not a fictitious character and indeed the accused and PW6 stayed in his house; (b) Ah Aun drove the car (P12) and he thereby had access to its keys on the morning of 16 September 1997 (the day of the alleged offence); (c) the key to P12 was left on a table in the hall of Ah Aun's house; (d) the boot of P12 was clearly assessible to PW6 and Ah Aun during the material period before the accused and PW6 was stopped at the police road block; (e) he did not see the accused put anything into the car boot. And, most importantly, PW6's adverse testimony was not challenged and neither was he impeached by the prosecution though they would have had his '112 statement'. Where a prosecution witness whose earlier statement is favourable to the prosecution gives evidence favourable to the defence, he should be discredited in accordance with the procedure laid down in detail in the judgment of Taylor J in *Muthusamy v. Public Prosecutor* [1948] MLJ 57. The evidence elicited from PW6 was highly

material and relevant to the defence. Even if he was an interested witness (there was no such suggestion by the prosecution), I would nevertheless repeat the principle clearly enunciated in *PP v. Balasingham* [1959] 25 MLJ 193 by Ismail Khan J, who said: "There is no legal presumption that an interested witness should not be believed. He is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances". This principle, I had occasion to affirm in similar terms, in *PP v. Yap Boon Chang* [1992] 2 CLJ 1257.

From the nature of the evidence led, I have no difficulty to conclude that the prosecution has failed to make out a *prima facie* case of exclusive custody and/or control of the drug exhibits against the accused – indeed, not even on a 'minimal evaluation' basis, if I may add. This court cannot be unmindful that ownership of vehicle P12, with his mere presence therein and possession of the keys thereto at the time of his arrest, without more, cannot and must not be made grounds to call the accused to enter on his defence (see also *PP v. Aris bin Yunus (supra)*).

The above conclusion notwithstanding, it further behoves me to also consider whether the prosecution had succeeded in their endeavour to establish a *prima facie* case of – what I would express as – criminal possessory linkage coupled with and presence of criminal knowledge *(mens rea)* of the dangerous drugs, by adducing strong circumstantial evidence, clearly pointing to such linkage and knowledge. The prosecution had succeeded in establishing that, the accused, at the time of his arrest: was driving car no. WDV 3265 (P12) with PW6 as his front passenger; owned P12; had the ignition key to P12; and, thereby also had access to the boot of P12. In this regard, the court has to bear in mind that control and management of a vehicle by a person does not *ipso facto* put him in custody, control or management over all items in the vehicle. I would propose to deal with the above issue under captions as follows:

Demeanour Of The Accused

PW5 said that the accused who was beside him appeared scared when the drug exhibits were opened. However, this witness also said that immediately before the boot was inspected, two straws of heroin contained in a Dunhill cigarette packet was recovered D/K Ku Ahmad Zamri from the right-front-trouser pocket of PW6. Thus, in my view the alleged appearance of the accused during the search of the boot, is equivocal in nature as his 'scared look' could be attributable to his having seen the discovery by the police of the heroin on the person of PW6. This piece of evidence even if true is therefore of little consequence. I find my view here bolstered by compelling dicta of Edgar Joseph Jr (SCJ) in *Abdullah Zawawi bin Yusoff (supra)*, who, on a similar point, had this to say (at p. 9):

> "We now come to what does seem to us to be evidence of a potent kind against the appellant, namely his conduct in taking to his heels upon Insp Mat Yusoff announcing the discovery of the drugs in the box. This conduct of the appellant was consistent with his having known of the presence of the drugs in the box before their discovery, indicating thereby a sense of guilt. On the other hand, it was conduct equally consistent with the appellant having been in a state of pure panic, bearing in mind that it was only after Insp Mat Yusoff announced the discovery of the drugs that the appellant took to his heels. An innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way." See also *Saad bin Mat Takraw & Anor (supra)*.

P5K And P5L Found In P5A

PW6 said that the yellow shirt (P5K) and a pair of green trousers (P5L) belong to the accused while a long sleeve batik shirt (P6L) was his. He does not know to whom the yellow 'T' shirt (P6K) belong. When he left P6L in the boot of P12 on the morning of 15 September 1997 he did not place it in P6A (the plastic bag). He is unaware when the yellow shirt, the green trousers, the yellow 'T' shirt and the long sleeve Batik shirt (exh. P5K, P5L, P6K and P6L respectively) were placed in P5A and P6A (the two plastic bags). In conjunction with this feature of PW6's testimony, evidence was also led from PW5 to the effect that four packets of the plant material suspected to be cannabis (P5F, P5J, P6F and P6J) were found in two open plastic bags, one bearing 'Cardini' (P5A) and the other, bearing 'Mun On Taylor (P6A). And, both P5A and P6A contain the pieces of clothing P5K, P5L, P6K and P6L. The yellow shirt and the green pair of trousers (P5K and P5L) were placed on top of and covering P5F and P5J, whilst the yellow 'T' shirt and long sleeve batik shirt (P6K and P6L) covered P6F and P6J. To further dovetail PW5's evidence, the investigating officer PW7 said that P5K, P5L and P6K fitted the body-size of the accused whereas P6L fitted PW6.

However, the potency of this aspect of the prosecution case was diluted to nought by PW5's acknowledgement that P5K, P6K and P6L were about the same size. And that, besides P5A and P6A, there were many other things in the boot of the car, including a bag of clothes and an open cardboard box also containing clothes and other items. The bag of clothes had a zip which was not locked, and appeared in photo exh. P8E to be damaged and not in working condition. It was for this reason that, he readily agreed that it was possible for someone to place P5A and P6A containing the said packets of plant material and then cover them with whatever clothing found in the boot of the car. And, also, it could well be that P5A and P6A with their contents had been placed in the boot of P12 by some other person besides the accused.

Clearly, I could think of at least three possible inferences that could be drawn from the above evidence, namely: the accused may have placed P5A and P6A with the drugs and covered them with his own clothing P5K, P5L and P6K, and PW6's long sleeve batik shirt (P6L); or, similarly PW6 may have done just that, and used his long sleeve batik shirt (P6L) and the accused's clothing, P5K, P5L and P6L to cover the offending exhibits; or, the much featured character Ah Aun may have planted P5A and P6A in the boot of the car (to which he clearly had access) and covered their contents with whatever clothing readily available from the said zip-bag of clothes and the said open cardboard box depicted in photo P8E. I note with interest that circumstances somewhat similar to our instant case also obtained in the case of *Choo Teck Soon v. PP* [1954] 20 MLJ 63 where Wilson J had occasion to make the following remark: "There is no evidence that the tin was in the car at the time the car was parked and it is obvious that any person who so desired could have planted the tin of chandu there during the night. In these circumstances the appeal must succeed and the conviction and sentence be quashed."

It is trite law that where circumstantial evidence points to two or more inferences, it should be resolved by ascribing the more favourable inference to the accused: See *Lin Lian Chen (supra);* and, *Phoon Liat Sum v. PP* [1950] 16 MLJ 205 – "some of the evidence on which they were based was capable of a construction equally in favour of the accused" – Per Hill J. At any rate, the above evidence against the accused could at the most go to make up only one of the myriad strands in a hangman's rope of circumstantial evidence, since such evidence is essentially, of juxtaposition of his clothes with the offending exhibits. As such, due to the above frailities of the prosecution evidence, if it is yet intended to show a physical linkage between the accused and the offending exhibits, through evidence of his having handled them, it is indeed unfortunate that (as confirmed by the investigating officer) the accused's hands or fingernail clippings were not examined for traces of cannabis or cannabinoids; and neither the transparent plastic wrappers P5B, P6B nor the newspapers P5C, P6C(1-3) and P6G were dusted for fingerprints. Indeed, according to the government chemist (PW4), the said two plastic wrappers and even some portions of the said newspapers had smooth and flat surfaces, and the usual practice is for finger prints to be lifted from flat or smooth surfaces.

Ah Aun is not a fictitious character. The accused and PW6 had to pass the night and put up at some abode somewhere, when they arrived in Perlis from Johore, especially as there was not a scrap of evidence that either or both of them had stayed in a hotel or went across the Malaysian-Thai border. When cross-questioned, PW8 said that the premises address where both of them had stayed for the night, was given as No. 13 Jalan Indah, Taman Indera Indah,

Kuala Perlis. Thus, as it was a permanent premises in Perlis with a specific and fixed address, I fail to understand why no steps were taken to trace the identity of the owner of premises No. 13; who could very well turn out to be the character 'Ah Aun' or – if not so – lead the police to 'Ah Aun'. It is a truism that all legitimate permanent premises with fixed addresses must necessarily have registered owners. The investigating officer admitted that he did not take any steps to locate the house owner or occupier, though he claimed to have visited the address on 19 September 1997, and twice further, to look for Ah Aun. Hence, for my decision on this point, I need do no more than to accept, with respect, and repeat the views of the Supreme Court in *Pang Chee Meng (supra)* expressed (at p. 142) in the following terms: "If some of these claimed witnesses cannot be traced, it was a combination of unhappy circumstances in this case. The accused cannot be penalised for lack of ingenuity in police investigations depriving him of the time-honoured benefit or doubt."

The RM2,500 Issue

Evidence was also introduced by the prosecution, which if accepted by this court, may go to satisfy at least the lower *prima facie* degree of proof applicable at this stage of the trial. The investigating officer (PW8) said that from his investigations, and bearing in mind the fact that out of the six wrapper pieces of newsprint papers (P5C, P5G, P6C(1-3) and P6G) five of them were in Siamese and one in Chinese language, he came to the conclusion that the offending exhibits were obtained from Thailand. And, he understands that a kilo of cannabis there costs between RM800 to RM1,000. More potently, he then went on to state that his investigations revealed that a sum of RM2,500 had been withdrawn from the Automatic Teller Machine (A.T.M.) "on 15 September 1997", and among the six cards seized from the accused was a Maybank Visa (classic) card and a Maybank Master card. However, when questioned by counsel he admitted that no international passport was recovered from the accused or the car (P12); and contradicted himself on the source of the offending exhibits when he agreed that his investigations confirmed the accused had not made any trip to Thailand.

Then, at the eleventh hour, after defence counsel had completed cross-examination of the last witness (PW8), the learned deputy sought the court's leave to effect, what may be termed as 'emergency repairs to defects in its case' – per Mohtar Abdullah J in *PP v. Lin Lian Chen* [1991] 1 MLJ 316 – by tendering three further exhibits. This, I allowed, subject to right of the defence to cross-examine on the fresh exhibits. PW8 said that he found three bank-withdrawals slips from the accused's wallet (P13B), to wit: two slips indicating two withdrawals effected at Kuala Perlis through the Maybank

A.T.M. by a CR Card ('dari CR Card') on 15 September 1997 for an aggregate amount of RM2,000; and, one slip indicating a withdrawal effected at Masai, Johore also through the Maybank A.T.M machine, by a Visa Card ('dari Visa') on 13 September 1997 for RM500. The three bank-withdrawals slips were admitted and marked as exhs P13G(1-3).

When cross-questioned he acknowledged that the exhs P13G(1-3) were not listed in the search list (P14). He further acknowledged that P13G(1-3) contained no name or account number or other particulars to associate or link any of them (the three slips) to any of the said six cards, including the Maybank Master Card and the Maybank Visa (Classic) Card. The court's inspection of P13G(1-3) confirmed that this was so. Also noted was that the two slips pertaining to the two alleged withdrawals from Kuala Perlis contained the unexplained word 'CR Card' rather than 'Visa Card' or 'Master Card' (the two Maybank card seized). A measure of guidance on the topic of search list could be gleaned from a passage in the judgment of Edgar Joseph Jr FCJ in *Alcontara a/l Ambross Anthony v. PP* [1996] 1 MLJ 209 which read (at p. the 220-G): "We must add that, in a situation such as this, where there was an acute conflict of evidence on a material point, namely, the result of the search of the person of the accused, and a search list contemporaneously prepared by the police was presumably in existence, a copy thereof, ought, in all fairness, to be tendered in evidence or its non-production accounted for, the sanction for not doing so being the presumption, that if produced, it would have been unfavourable to the prosecution. (See s. 114(g) Evidence Act 1950)." Thus, therein, it was held to be "an error on a most material point which was directly relevant to the defence .." when, in the grounds of judgment of the High Court, mention was made of a certain cash item listed in a search list that was not tendered as an exhibit by the prosecution. Obviously and clearly, the net effect of the adverse presumption drawn in that case would be that the said cash item was not in fact recovered from the accused in the amount as alleged by the prosecution witness.

Although, in the current case the search list was in fact tendered as exh. P14, yet it would follow by force of logic that since "there was an acute conflict of evidence on a material point" – namely, whether in fact the three bank slips were recovered from, and any withdrawal was effected by the accused – the fact that none of the slips was listed in P14, would attract the adverse presumption against the prosecution under the general provision of s. 114 of the Evidence Act 1950; and I so hold, albeit only pertaining to the bank slips. The ratio in *Alcontara (supra)* must be carried to its logical conclusion, as surely, it cannot be rational to hold that so long as a contemporaneously prepared search list – however deficient in its itemisation – becomes a court

exhibit, all other items not in the list but allegedly recovered from the accused could be tendered in evidence without attracting such adverse presumption, that the non-listed items were not so found on the person of the accused. It is entirely logical and reasonable for the court to presume that a contemporaneously prepared search list would essentially be complete and exhaustive on the items relevant and essential to the case against the accused, as it is a fact which is "likely to have happened, regard being had to the common course of natural events, human conduct ..."; to hold otherwise would be to negate the whole purpose of requiring a contemporaneous search list to be prepared.

Furthermore, even though the three bank slips were admitted, yet because of the lack of any useful particulars that could be gleaned from the slips, it became of vital importance that the three alleged withdrawals, from Kuala Perlis and Masai, be proved by affirmative evidence from the relevant officer of the bank which issued the said two Maybank Credit Cards. The evidence of withdrawals was of the potent kind and it is therefore necessary to enlighten the court. Thus, it came as no surprise then, that learned counsel urged the court to draw an adverse inference against the prosecution under s. 114(g) of the Evidence Act 1950, for its failure to call the bank officer to render evidence pertaining to the withdrawal transactions dated 13 and 15 September amounting to RM2,500; being also the reputed equivalent Thai-market value of the offending exhibits.

The approach the court should take on the application of s. 114(g) has been quite plainly summarised by Chong Siew Fai CJ (Sabah & Sarawak) in *PR v. Mansor bin Mohd. Rashid & Anor* [1996] 3 MLJ 560. What he said was this (at p. 579):

> Much had been canvassed before us respecting the drawing of adverse inference under s. 114(g) of the Evidence Act 1950 from the non-calling of Cholar and Amran. Whether or not such an inference should be drawn is not a matter of an inflexible rule but depends upon the circumstances of each particular case. In determining this issue, the question to consider is whether the existence of a fact or a state of things (ie, Cholar introducing PW9 and was present at the meetings; Amran staying in room 'K') makes the existence of another fact or state of things so likely that it may be presumed to exist. The answer must naturally vary according to the circumstances, *the nature of the fact required to be proved and its importance in the controversy, the usual and commonly recognized mode of proving it, the nature, quality and cogency of the evidence which had not been produced and its accessibility to the party concerned*. (Emphasis added).

Applying the above guidelines in the instant case, I would have no hesitation to allow the defence to invoke s. 114(g) against the prosecution as: (a) considering the dearth of probative information contained in the three slips, it was of utmost importance that the officer from Maybank be called; (b) there was hardly any problem in calling such officer and no reasons were advanced for not calling him; and, (c) it is the usual and commonly recognised mode of establishing such proof against an accused. In criminal jurisprudence, the court is ever mindful of the two abiding principles encapsulated in the following adages: he who alleges the affirmative is enjoined to prove by affirmative evidence and not by surmise or conjectures; and, when a man's life or liberty is at stake, the courts are cautioned to expect the best evidence. Consequently, this court must perforce draw the adverse presumption under s. 114(g) against the prosecution for not calling the bank officer on exh. P13G(1-3), and these three bank slips should be completely disregarded. As I see it, the only useful purpose the three bank slips – considering the paucity of incriminating particulars therein – could serve would be as a cue to prompt the prosecutor to take the obvious steps necessary to drive home proof of that aspect of the evidence essential to the unfolding of the narrative. It would also follow that the piece of evidence from the investigating officer concerning the RM2,500 withdrawal is without any evidential foundation or basis and no weight at all should be accorded to it. It is trite law that evidence that merely engender suspicion and surmise – however compelling – ought to be disregarded unless such evidence attains the requisite high level of criminal proof.

In the event, after having studied thoroughly all the evidence led by the prosecution including the testimony of PW6, which was unchallenged and of considerable import, and after giving careful thought to all the arguments put forward by both sides, I do not see how, from the evidence taken cumulatively, I could conclude that the prosecution has made out a *prima facie* case against the accused on trafficking, or even on possession of the drug exhibits. In a nutshell, it is unfortunate that the prosecution had themselves undermined their case, which was crushed under the weight of adverse, unimpeached testimony from their own witness (PW6), to the effect that the car and the boot was, during the material period, clearly accessible to no less than three persons (the accused, Ah Aun and himself). Indeed, his evidence, when considered in its entirety, has the nett effect of leaving the accused clean and dry. PW6 was an ex-convict, convicted by admission, for possession of heroin on his person while travelling on the day in question, as a front passenger in car no. WDV 3265 driven by the accused. Yet, nonetheless, he was not charged in the current charge on the basis of common intention (under s. 34 of the Penal Code) for reasons privy only to the prosecution. Whereas, the accused who now stands in the dock before this court, is deemed to be clothed with the presumption of innocence until proven guilty of the charge.

Bearing in mind the fundamental principle in criminal cases, that the abiding burden rests upon the prosecution throughout until the conclusion of the trial, to prove its case, it would be unjust, unsafe and wholly futile (this could be termed the 'futility rationale or approach') to call upon the accused to enter on this defence just to see whether he would in his evidence self-incriminate, when, after careful consideration of the evidence led by the prosecution on the essential ingredients of the offence, acquittal of the accused upon a higher degree of proof is virtually inevitable (as in the case at hand), even should the accused elect to remain silent and calls no witness. Thus, quite correctly, in *PP v. Saimin & Ors* [1971] 2 MLJ, Sharma J held that the magistrate's reasoning for calling the accused to enter on his defence was defective when he said, to wit: "I am making this ruling not because I am satisfied with the case of the prosecution but because I want the accused to explain for himself."

Conclusion

The prosecution has not made out a *prima facie* case on either trafficking or possession of the drug exhibits, and the accused is acquitted without calling upon him to enter on his defence.